

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

75-1019

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in the
**United States Court of Appeals
for the Second Circuit**

75-1019

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

BERTRAM L. PODELL AND MARTIN MILLER,
Defendants,

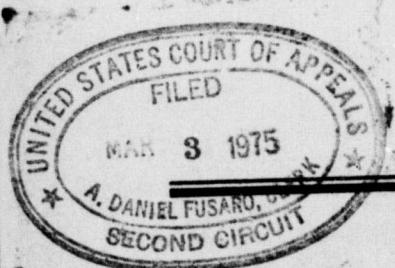
MARTIN MILLER,
Defendant-Appellant.

On Appeal From The United States District Court
For the Southern District Of New York.

**BRIEF OF DEFENDANT-APPELLANT,
MARTIN MILLER.**

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PRELIMINARY STATEMENT

This is an appeal from a decision of the Honorable Robert L. Carter, United States District Judge, refusing to vacate Appellant, MARTIN MILLER'S Plea of Guilty. Appellant claims the Government failed to keep its promise made during plea negotiations, and further that the plea was taken by the court in violation of Rule 11 of the Federal Rules of Criminal Procedure.

ISSUES PRESENTED**I.**

Did the lower court abuse its discretion in denying the Appellant, MARTIN MILLER'S Motion to Withdraw his plea of guilty.

II.

Does the record of the proceeding of October 1, 1974, at which time the Appellant, MARTIN MILLER entered a guilty plea show that the plea was entered knowingly and with an understanding of the charge, and that there was a factual basis for the Plea as required by Rule 11 of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

On October 1, 1974, the Appellant, MARTIN MILLER, entered a guilty plea to Count I only of the Indictment filed against him (A. 15-40) to wit: Conspiracy to Defraud the United States Government, 18 U.S.C. § 371. At the hearing the following colloquy occurred between the court and the Appellant:

THE COURT: Is there anything further?

MR. GIULIANI: Nothing further other than with regard to Mr. Miller, your Honor.

MR. MARX: May it please the Court, at this time I would like to offer to withdraw the plea of not guilty on behalf of the defendant Martin

Miller and offer to plead guilty to Count I of the Indictment as it pertains to the conspiracy to commit conflict of interest as was outlined by Mr. LaRossa as those portions of that count apply to Mr. Miller. That would include the conspiracy to defraud as well as to commit conflict of interest. It is the same plea as to count I as the Defendant, Podell entered.

THE COURT: That's it?

MR. MARX: That's it.

THE COURT: Mr. Miller, I think I am going to have to ask you a few more questions than I was required to ask the congressman.

First, I would like to know your age and your education.

DEFENDANT MILLER: I am 34, your Honor, and I have had a number of years of college.

THE COURT: Since you have not been on the witness stand I will have to ask you the next question: Are you in sound physical and mental health at the present time?

DEFENDANT MILLER: Yes, your Honor.

THE COURT: You are aware of what is going on?

DEFENDANT MILLER: Yes, sir.

THE COURT: You are changing your plea of your own free will and accord?

DEFENDANT MILLER: Yes, sir.

THE COURT: Without regard to any pressures that have been brought on you or threats by the Government or promises by your attorney?

DEFENDANT MILLER: Yes, sir.

THE COURT: You obviously realize that if you had not pleaded guilty the government would be required to convince 12 people on this jury of your guilt beyond a reasonable doubt and that you are foregoing that by pleading guilty? Do you understand that?

DEFENDANT MILLER: Yes, sir.

THE COURT: Am I correct it is five years, the maximum penalty, for what you are pleading to, and \$10,000 fine?

MR. GIULIANI: Yes, Your Honor.

THE COURT: Did you understand that?

DEFENDANT MILLER: Yes, sir.

THE COURT: I will ask you to tell me in your own words what you did which indicates that you are, in fact, guilty of Count I.

DEFENDANT MILLER: Your Honor, Congressman Podell was introduced to me as a congressman-attorney by Melvin Heiko. I, on behalf of Leasing Consultants, Inc. retained him for his influence. At the time I had no knowledge that I violated any of the laws of the United States. I understand now that I did.

THE COURT: But you did what you did knowingly and intentionally, is that correct?

DEFENDANT MILLER: Yes, sir.

THE COURT: Do you have anything to say?

MR. GIULIANI: Just basically the same statement that we made with regard to Mr. Podell: The Government is agreeable to taking this plea to the conspiracy count. We understand it to be a plea to conspiracy to violate the conflict of interest section and to defraud the United States, and not a plea to conspire to pay a bribe.

THE COURT: All right. Mr. Miller, I will accept the plea.

(A. 46-49)

Prior to the entry of the Plea of Guilty, the Defendant engaged in plea negotiations with the Government. These negotiations principally took place during the defense portion of the trial. The Government was represented by Rudolph Giuliani, Joseph Jaffe and Michael Mukasey. After hours of negotiation the Government

represented to the Appellant and his counsel that at the time of sentencing they would not recommend imprisonment, and that in fact they would call the court's attention to the cooperation the Appellant furnished the Government, prior to his indictment.

On January 2, 1975, Assistant United States Attorney, Michael Mukasey on behalf of the Government, wrote a three (3) page letter to Judge Carter, drawing the court's attention to the seriousness of the crimes committed by the Appellant and his co-defendant, which letter expressed a desire for a substantial term of imprisonment (A. 53-55). The last paragraph of the Government's letter, however, did state that the Appellant, MARTIN MILLER, did cooperate with the Government by providing valuable testimony to the Grand Jury prior to his indictment. (A. 55).

Upon receipt of a copy of the Government's letter, the Appellant, prior to sentencing, filed a Motion to Withdraw the Plea of Guilty. Appellant asserted as grounds, that the letter of January 2, 1975, clearly violated the intent and spirit of the plea-bargaining negotiations, and further the language as to Miller's cooperation was totally rendered ineffectual by the request for severe sentencing. The Appellant further asserted that had he known the Government would write such a letter urging the court to severely handle the situation as to a sentence, the Plea of Guilty would not have been entered. (A. 56-64).

On January 9, 1975, prior to sentencing, Judge Carter held an evidentiary hearing to determine whether a representation was made to the Appellant, MARTIN

MILLER, and his co-defendant, Podell by the Government and, if so, was there a breach of that representation (A. 77-79).

After extensive testimony, from the Appellants and from counsel for the respective parties, the lower court found that the Government's letter of January 2, 1975, did, in fact, recommend a jail sentence, and that it did, in fact, violate "the spirit if not the letter of the Agreement". (A. 180).

However, the court made a further finding that "once Mr. Podell pleaded guilty, Mr. Miller had nothing else to do, so that he had no choice, once Mr. Podell pleaded".

"Therefore, the Motion to Withdraw the Plea is denied". (A. 181).

Accordingly, the lower court entered a Judgment of Conviction against the Appellant, MARTIN MILLER, for conspiracy to defraud the United States of America, (18 U.S.C. 371), and sentenced him to prison for two (2) years, suspending all but six (6) months, and imposed a fine of Ten Thousand Dollars (\$10,000.00). (A. 198).

ARGUMENT

I.

THE LOWER COURT ABUSED ITS DISCRETION IN DENYING THE APPELLANT MARTIN MILLER'S MOTION TO WITHDRAW HIS PLEA OF GUILTY.

As previously stated, the lower court defined the issues to be resolved at the evidentiary hearing held January 9, 1975, to be; (1) whether certain promises or representations were made to the Defendant-Appellants during plea-bargaining negotiations and; (2) whether those promises or representations were breached.

It was uncontradicted in the record, that the Government's representation that it would not recommend a jail sentence, and that it would further "go to bat" for the Appellant, were an important factor in the Appellant MARTIN MILLER'S decision to plead guilty. (A. 190).

However, unsupported by the record, the lower court found although the Government did, in fact, breach the spirit, if not, the letter of the agreement, that the Appellant, MARTIN MILLER, "had no choice" but to plead guilty once Mr. Podell pleaded guilty. (A. 181).

Such an unsupported and subjective finding is clearly an abuse of the lower court's discretion. The Court's denial of the Appellant's Motion to Withdraw his Plea of Guilty is in direct conflict with the United States Supreme Court decision of *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

As in the case at bar, the Appellant in *Santobello*, supra, as part of his plea-bargaining negotiations, secured a promise that the prosecutor would abstain from recommending a sentence. However, as in the instant case, the prosecutor's office breached the agreement, and recommended a jail term for the Appellant, prior to sentencing. The Appellant moved the trial court to withdraw his plea of guilty, which was denied.

Upon a Petition for Certiorari, the Supreme Court held that where a plea rests in significant part upon a promise or representation of a prosecutor, so that it becomes part of the inducement or consideration, such a promise should be fulfilled. ID at 92 S.Ct. 499.

In a footnote to Justices Marshall's, Brennan's and Stewart's concurring opinion, it was noted that the majority believed that, in such a case where the Defendant seeks to vacate a plea, the relief should be granted. ID at 92 S.Ct. 502.

The test to be applied is an objective one; whether the plea-bargain agreement has been breached. *U.S. v. Brown*, 500 F.2d 375 (4th Cir. 1974). Thus, if the agreement is breached, and the record is uncontroverted, that the Defendant relied in "any significant degree" upon the agreement, the trial court must allow the Defendant to withdraw his plea of guilty. *Santobello*, supra, at 497. (emphasis ours).

It is respectfully submitted that the lower court abused its discretion in the case at bar, in that, after the court made its objective finding of an agreement and a breach, it applied a subjective standard to the Appellant's motives

for pleading guilty, devoid of any such evidence in the record. It is further submitted that the subjective finding made by the Court was an effort to place this case beyond the holding of *Santobello*, *supra*.

II.

APPELLANT'S GUILTY PLEA DID NOT CONFORM TO THE REQUIREMENTS OF RULE 11 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND WAS THUS IMPROPERLY ACCEPTED.

Rule 11 of the Federal Rules of Criminal Procedure requires that the trial court establish on the record at the time of the plea, that there is a factual basis for the plea and that it was entered knowingly and with an understanding of the charge. *McCarthy v. United States*, 394 U.S. 459 (1969); *Irizarry v. United States*, Docket No. 74-1866 (2d Cir., December 19, 1974, amended January 23, 1975); See also *Santobello v. New York*, *supra* at 498.

"A failure to scrupulously comply with Rule 11 will invalidate a plea without a showing of manifest injustice". *United States v. Cantor* 469 F.2d 435 (3d Cir. 1972) at 437.

As the record indicates, the Appellant, MARTIN MILLER, plead guilty to the charge of conspiracy to violate the conflict of interest law and to defraud the United States of America. He did not plead guilty to the substantive charge of conflict of interest as did his co-defendant.

"It is Hornbook Law that conspiracy and its underlying substantive offense are separate and distinct . . ." *United States v. Zane* 495 F.2d 683 (2d Cir. 1974) at 692.

It is evident from the colloquy, in the case at bar, at the time the Appellant entered his plea, that the charge was not understood and that the plea was not knowingly entered.

Upon questioning from the bench, the Appellant stated that although he retained the co-defendant for his influence, *he had no knowledge that he was violating the laws of the United States at the time of the transaction.* (A. 48, 49).

Such testimony reveals that the Appellant did not understand the charge of conspiracy, and that he did not knowingly enter a plea to such charge.

"The distinction between the scienter component of the conspiracy and substantive charges arises from the notion that although an individual may commit some crimes unwittingly he cannot conspire to commit a specific crime unless he is aware of all the elements of the crime. In Learned Hand's classic phrase,

'While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light unless one supposes that there is a light to run past'."

United States v. De Marco, 488 F.2d. 828 (2d Cir. 1973) at 832 (citation omitted).

Further, the federal crime of conspiracy requires proof of an intent, actual or implied, to violate a federal law. SEE: *United States v. Garafola* 471 F.2d 291 (6th Cir. 1972).

In the recent case of *Irizarry v. United States*, supra, this court held under facts similar to those in the case at bar, that conspiracy is a complicated crime, and while it need not be thoroughly explained and explored, the court should establish the barebones elements of the offense at the time of a guilty plea. *Irizarry*, supra at 913b.

It is submitted that pursuant to the standards as set forth in *Irizarry*, supra, the court failed to establish upon the record, a factual basis for the plea. Neither the testimony of the co-defendant, Podell (A. 43-44), or the Appellant, Miller, established that they knowingly conspired together to violate the conflict of interest law, and defraud the United States of America. Each of the Appellants testified that they did not know at the time of the transaction that they had violated any law of the United States Government. Hence, based on the foregoing plea, MARTIN MILLER could have been convicted for violating the substantive offense, but not for conspiracy.

Although the court could refer to additional material at the time of the Appellant's plea to determine whether or not there is a factual basis for such a plea, such material must be made a part of the record of the proceedings at which time the plea was entered. *Irizarry*,

supra at 910. However, no other facts other than the Defendants' testimony was entered into the record at the time of their plea of guilty.

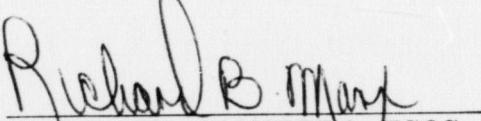
Thus, pursuant to the holding of this court in *Irizarry*, supra, at 912, the factual basis for the plea entered by the Appellant, MARTIN MILLER, must be determined solely on the basis of the testimony adduced at the time of his plea.

Accordingly, it is respectfully submitted, that it is clear from the face of the transcript of testimony taken at the time the Appellant entered his guilty plea that (1) the nature of the charge of conspiracy was not explained to the Appellant; (2) The Appellant did not knowingly enter his plea of guilty to conspiracy; (3) that the Appellant did not understand the charge of conspiracy, and (4) a factual basis for a guilty plea to conspiracy was never established.

CONCLUSION

Pursuant to the foregoing facts and law presented herein, the Appellant's guilty plea should be withdrawn and the Appellant should be allowed to plead anew.

RESPECTFULLY SUBMITTED.



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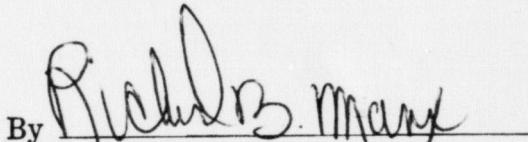
RICHARD B. MARX

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the within Brief of Defendant-Appellant has been mailed this 28th day of February, 1975, to Honorable Paul J. Curran, United States Attorney, Southern District of New York, United States Department of Justice, 26 Federal Plaza, New York, and LaRossa, Shargel, and Fischetti, Attorneys, 522 Fifth Avenue, New York, New York, 10036.

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